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Supreme Court, U.S.
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NO. 95-1554

In the
Supreme Court of the United States

OCTOBER TERM, 1995

MYRON BATTS,
Petitioner

v.

TOW-MOTOR FORKLIFT COMPANY and
CATERPILLAR INDUSTRIAL, INC.
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a diversity case applying state law, is the court required to grant relief from judgment under Federal Rule of Civil Procedure 60(b)(6) where, after the case is no longer *sub judice*, a state decision in an unrelated case indicates that state decisional law changed prior to the date of the federal court trial, with the result that the federal court misapplied state law?

Is the answer different where the losing party has unsuccessfully moved for a stay pending an anticipated change in state law?

PARTIES TO PROCEEDING

The petitioner is Myron Batts.

The named respondents are Tow-Motor Forklift Company and Caterpillar Industrial, Inc. The correct name of the entity named by petitioner as Tow-Motor Forklift Company was Tow-Motor Corp. Tow-Motor Corp. changed its name to Caterpillar Industrial Inc. Caterpillar Industrial Inc. is the successor-in-interest to Tow-Motor Corp. Caterpillar Industrial Inc. is wholly-owned by its parent, Caterpillar Inc. Caterpillar Industrial Inc. has no non-wholly owned subsidiaries.

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OPINIONS BELOW

The opinions below are properly identified in the petition, provided that the third cited opinion -- the decision for which certiorari review is sought -- is reported as *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743 (5th Cir. 1995).

STATEMENT OF THE CASE

After this product liability action was tried in 1991 to a defense verdict for the defendant Caterpillar Industrial, Inc. ("Caterpillar" or "respondent"),[1] affirmed on appeal, and the time to petition for certiorari had passed, plaintiff Myron Batts ("Batts" or "petitioner") filed a Federal Rule of Civil Procedure 60(b)(6) motion for relief from judgment on the basis of a subsequent Mississippi Supreme Court decision, *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss. 1993). *Prestage* stated that applicable Mississippi law had changed in 1988. The district court concluded that it had misapplied state law and granted relief, vacating judgment. On interlocutory appeal, the United States Court of Appeals for the Fifth Circuit reversed, holding that the district court abused its discretion in granting relief on the ground of a post-judgment change in law without more. Petitioner then filed the instant petition.

The district court described the change in Mississippi decisional law from the "consumer expectations" test to the "risk-utility" test of strict liability,

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[1]Tow-Motor Forklift Company and Caterpillar Industrial, Inc. were named as defendants. Caterpillar Industrial Inc. is the successor-in-interest of Tow-Motor Corp., incorrectly identified by plaintiff Batts as Tow-Motor Forklift Company.

which *Prestage* in 1993 said occurred in 1988, as "the best kept secret in Mississippi jurisprudence." *Batts v. Tow-Motor Forklift Co.*, 153 F.R.D. 103, 106 (N.D. Miss. 1994). The district court in the 1991 trial of this action applied the consumer expectations test of defect in an instruction offered by the plaintiff. Consistent with the consumer expectations theory of defect, it also instructed the jury on the "open and obvious" defense, i.e., that an open and obvious danger cannot be unreasonably dangerous and is a bar to recovery. The "open and obvious" instructions were given over Batts' objection that the court should extend premises liability law to products liability. Batts, who offered the consumer expectations instruction, clearly did not argue that the law had changed to a risk-benefit test of defect. On appeal Batts did not -- and could not -- assign the giving of (his own) consumer expectations instruction as error.

Respondent Caterpillar incorporates by reference the statement of facts and procedural history in the opinion below, *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743 (5th Cir. 1995).

REASONS FOR DENYING THE WRIT

The writ should be denied because there is no compelling reason to grant it. Petitioner Batts has pointed to no reason of the character considered by the Court. *See* Supreme Court Rule 10. No conflict with decisions of other circuits is urged. Petitioner offers no explanation for his assertion that the issue is important enough to merit certiorari review.

The reasons offered by petitioner for granting the writ are (i) that the Fifth Circuit's holding is inconsistent with the purpose of Rule 60(b)(6) to accomplish justice, and (ii) that the lower federal courts have inconsistently interpreted Rule 60(b)(6) in the context of a post-decision change or clarification in controlling law. Both lack foundation. Neither supports certiorari review.

Petitioner's first argument in effect is that the Fifth Circuit's holding of abuse of discretion is in error. The primary purpose of certiorari review is not to correct error but to resolve conflicts and determine questions of importance. The misapplication of a properly stated rule of law, as alleged here, rarely supports grant of certiorari. *See* Supreme Court Rule 10.

Respondent Caterpillar agrees that the purpose of Rule 60(b)(6) is "to enable [courts] to vacate judgments whenever such action is appropriate to accomplish justice," *Klapprot v. United*

States, 335 U.S. 601-614-15 (1949), but disagrees that vacating judgment was appropriate to accomplish justice in this case. The Fifth Circuit properly concluded that the required showing of injustice is "substantial" and properly held that the trial court abused its discretion in granting relief on the basis of a post-judgment change in law without more. *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748, 749 (5th Cir. 1995). Contrary to petitioner's assertion, the numerous Rule 60(b)(6) cases addressing post-judgment change in law in different circumstances (many of which are cited herein) define the scope of discretion under Rule 60(b)(6). Petitioner's first argument does not merit certiorari review.

Petitioner's second argument stops short of alleging there is a conflict of decisions, as it must, and asserts instead that the lower courts have applied Rule 60(b)(6) to post-judgment change of law inconsistently. Even the allegation of inconsistency is overstated. The "inconsistency" is accounted for by differences in the circumstances attending each case. Indeed, petitioner's own statement of the rule is that a post-decision change or clarification in controlling law "may, in appropriate cases" warrant Rule 60(b0(6) relief. *See* Petition at 12.

Below, the Fifth Circuit distinguished several of the cases which petitioner claims demonstrate inconsistency. 66 F.3d at 748 n. 6. The Fifth Circuit noted that courts have held

a post-judgment change in law constituted an extraordinary circumstance justifying relief: in the context of a petition for habeas corpus, where notions of finality have no place, ***Matarese v. LeFevre***, 801 F.2d 98, 106 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987); where the erroneous judgment has not been executed, where an appeal or remand of the case is still pending, or the judgment is not final, e.g., ***Adams v. Merrill Lynch Pierce Fenner & Smith***, 888 F.2d 696, 702 (10th Cir. 1989); ***Wilson v. Al McCord, Inc.***, 858 F.2d 1469, 1478-79 (10th Cir. 1988); ***Overbee v. Van Waters & Rogers***, 765 F.2d 578, 580 (6th Cir. 1985); where the subsequent decision is closely related to the case in question, such as where the Supreme Court resolves a conflict between another circuit ruling and that case, ***Ritter v. Smith***, 811 F.2d 1398, 1402-03 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987); or where two cases arising out of the same transaction result in conflicting judgments, ***Pierce v. Cook & Co.***, 518 F.2d 720, 723 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079 (1976). *See* ***Batts***, 66 F.3d at 748 n.6. Each of these cases involved extraordinary circumstances not present in Batts' case. Further, no case suggests that an unsuccessful motion for a stay pending an anticipated change in law constitutes an extraordinary circumstance justifying relief.

Far from inconsistent, the Fifth Circuit's application of Rule 60(b)(6) in this case is entirely consistent with application of the rule by other circuits in similar circumstances. The Fifth

Circuit correctly noted its consistency with its own decisions, ***Bailey v. Ryan Stevedoring & Co.***, 894 F.2d 157, 160 (5th Cir.), *cert. denied*, 498 U.S. 829 (1990); ***Picco v. Global Marine Drilling Co.***, 900 F.2d 846, 851 (5th Cir. 1990); and those of other circuits, ***DeWeerth v. Baldinger***, 38 F.3d 1266, 1272-74 (2d Cir.), *cert. denied*, 486 U.S. 1056 (1994); ***Dowell v. State Farm Fire & Cas. Auto Ins. Co.***, 993 F.2d 46, 48 (4th Cir. 1993); ***Seese v. Volkswagenwerk, A.G.***, 679 F.2d 336, 337 (3d Cir. 1982); ***Tomlin v. McDaniel***, 865 F.2d 209, 211 (9th Cir. 1989); ***Ashland Oil, Inc. v. Delta Oil Prods. Corp.***, 806 F.2d 1031, 1033-34 (Fed. Cir. 1986); ***Collins v. City of Wichita***, 254 F.2d 837, 839 (10th Cir. 1958). *See* ***Batts***, 66 F.3d at 747-48, 749, 750.

The general rule applied in these decisions is that a post-judgment change in law without more does not justify relief from judgment. The Fifth Circuit's decision in this action is particularly consonant with the Second Circuit's decision in ***DeWeerth*** that a "clarification" of state law after a case is no longer *sub judice* does not justify Rule 60(b)(6) relief. *See* ***DeWeerth***, 38 F.3d at 1272-74.

Because the decision below was not in conflict with, but was entirely consistent with, decisions of the Fifth Circuit and other circuits, petitioner's second argument lacks merit.

While federal procedural matters presenting conflicting decisions, or novel or difficult questions may be

sufficiently important to merit certiorari review, the issue petitioner would place before the Court presents neither a conflict nor novel or difficult questions. The circuit courts of appeal in the exercise of their discretion have dealt often and consistently with the issue, as established above. Accordingly, the petition does not present an "important matter" or "important question" and is not certworthy. *See* Supreme Court Rule 10.

In addition, an omission of fact in the petition could result in this Court's not reaching the question presented if the writ were granted. Petitioner omits the fact that the case was tried under a consumer expectations analysis on his own instruction. If the law changed in 1988, petitioner was in error in offering a consumer expectations instruction. He cannot obtain a new trial under a risk-benefit theory when the case was tried under a consumer expectations theory on the basis of a jury instruction he requested. ***Satcher v. Honda Motor Co., Ltd.***, 855 F.Supp. 886, 894-95 (S.D. Miss. 1994), *aff'd in part, rev'd in part on other grounds,* 52 F.3d 1311 (5th Cir. 1995).

CONCLUSION

Respondent Caterpillar respectfully submits that petitioner has failed to establish any compelling reason for granting a writ of certiorari. The petition should therefore be denied.

Respectfully submitted,

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